SAM P. JONES
(ON JUDICIAL REMAND)

IBLA 83-177 Decided January 11, 1985

Remand to the Board by the United States District Court for the Southern District of Mississippi for reconsideration of Sam P. Jones, 74 IBLA 242 (1983), in light of supplemented record.

Sam P. Jones, 74 IBLA 242 (1983), affirmed in part, as modified, and vacated in part; decisions of the Eastern States Office, Bureau of Land Management, affirmed in part, as modified, and vacated in part and cases remanded.

1. Mineral Leasing Act for Acquired Lands: Lands Subject to -- Oil and Gas Leases: Lands Subject to

   Where an offer to lease oil and gas on acquired lands describes land, part of which is within an incorporated city and part of which is outside the city, the Mineral Leasing Act for Acquired Lands, as amended, 30 U.S.C. § 351 (1982), precludes leasing of those lands within the city.

2. Mineral Leasing Act for Acquired Lands: Consent of Agency -- Oil and Gas Leases: Consent of Agency

   The Mineral Leasing Act for Acquired Lands, as amended, 30 U.S.C. § 351 (1982), requires that the consent of the administrative agency having jurisdiction over acquired land described in a lease offer be obtained prior to the issuance of a lease for such land. Where the Corps of Engineers does not consent to lease because its research testing could be affected by a drilling operation, the Department of the Interior is without authority to lease.

APPEARANCES: Mary Katherine Ishee, Esq., Office of the Solicitor, Alexandria, Virginia, for the Bureau of Land Management; T. L. Cubbage II, Esq., Bartlesville, Oklahoma, and David W. Ellis, Esq., Vicksburg, Mississippi, for Sam P. Jones and Phillips Petroleum Company.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

By order filed on September 26, 1984, United States Magistrate John R. Countiss III of the United States District Court for the Southern District of Mississippi remanded for our reconsideration the Board's decision in Sam P. Jones, 74 IBLA 242 (1983). That decision, issued on July 19, 1983, affirmed a decision of the Eastern States Office, Bureau of Land Management (BLM), rejecting noncompetitive over-the-counter oil and gas lease offers for acquired lands in Warren County, Mississippi. Our reconsideration is directed by the United States Magistrate in light of certain documents filed as a supplement to the administrative record.

On May 28, 1981, Sam P. Jones filed acquired lands oil and gas lease offers ES-28059 and ES-28060 for approximately 818 acres and 534 acres, respectively, in Warren County, Mississippi, pursuant to the Mineral Leasing Act for Acquired Lands, as amended, 30 U.S.C. § 351 (1982). By letter of March 25, 1982, BLM requested the Department of the Army, Corps of Engineers (COE), Vicksburg District, the agency having jurisdiction over the land, to complete a title report for the lands sought by Jones. COE responded by letter of July 2, 1982, stating, "Waterways Experiment Station [WES] does not consent to lease the lands covered under ES-28059 and ES-28060 under a noncompetitive lease. It is their desire to obtain competitive bids on the leases." As a result of this response, BLM on October 1, 1982, rejected the subject offers because the surface management agency, COE, had withheld its consent to lease.

Our decision of July 19, 1983, affirmed BLM and held that the Secretary is without authority to lease acquired lands without the consent of the agency having jurisdiction over the lands. Therein at page 243, we set forth section 3 of the Mineral Leasing Act for Acquired Lands, 30 U.S.C. § 352 (1982):

> No mineral deposit covered by this section shall be leased except with the consent of the head of the executive department, independent establishment, or instrumentality having jurisdiction over the lands containing such deposit * * * and subject to such conditions as that official may prescribe to insure the adequate utilization of the lands for the primary purposes for which they have been acquired or are being administered.

COE's statement that it desired to lease the lands competitively, we held, appeared to be a condition to leasing rather than the consent to leasing required by the statute.

Judicial review of the Board's decision was sought by Jones and Phillips Petroleum Company (Phillips) 1/ in the United States District Court for the Southern District of Mississippi. Jones v. Clark, No. W83-0176(B) (D. Miss. filed Oct. 5, 1983). During this review, the Government filed a supplement to the administrative record consisting of the following documents, inter

1/ The case files include unapproved assignments of Jones' interest in each lease to Phillips.

alia: A list of oil or gas wells in the vicinity of the WES; internal COE correspondence reflecting COE's view that the amount to be paid in rent by Phillips would be insignificant when compared with that obtained by surrounding property owners; 2/ internal COE correspondence recommending that the WES property be leased pursuant to a formal solicitation calling for a term not to exceed 5 years, subject to a nonentry or nondrilling clause, and providing that all offers could be rejected; 3/ internal COE correspondence restating Phillips' willingness to accept, if necessary, a nonentry or nondrilling clause; 4/ and numerous oil and gas lease offers submitted by Champlin Petroleum Company. The filing of these documents by the Government apparently prompted the Magistrate's remand of the record to this Board for reconsideration.

Pleadings filed with the Board during reconsideration set forth a changed basis for BLM's rejection of the subject lease offers. In a pleading filed November 15, 1984, counsel for BLM attached correspondence from COE to the Assistant Secretary of the Army, dated January 26, 1984, which provides in part:

> The areas requested for lease [ES-28059 and ES-28060] comprise a total of 1,351.55 acres of land, 679.67 acres of which encompass the entire Corps of Engineers' WES installation. The remaining acreage in the application are private lands.
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> 2. The initial recommendation from WES was that the entire acreage in WES were not available except for competitive leasing. BLM subsequently rejected the non-competitive offers to lease.
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> 3. Mr. Sam P. Jones, the original offeror, and his assignee, Phillips Petroleum, appealed the rejection to the Department of Interior Board of Land Appeals. The Board affirmed BLM's decision but stated that ". . . BLM has no authority to put the lands up for competitive bidding absent a determination that the lands are included within the boundaries of a known geologic structure of a producing oil or gas field."
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> 43 C.F.R. 3100.7-1. It was later determined that the WES was not located within a known geologic structure, and that BLM was without authority to lease competitively.
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> 5. The Department of Justice and this office have agreed that the Offers to Lease should be forwarded for a determination

2/ Memorandum dated May 21, 1982, from Col. Tilford C. Creel, Director of WES.
3/ Memorandum dated May 14, 1982, from C. L. Rone of WES.
4/ Memorandum dated Apr. 27, 1982, from Col. Samuel P. Collins, Jr., District Engineer, COE.

> of availability. We recommend that consent to leasing be withheld over the entire 679.67 acres of land which comprise the WES installation for the following reasons:
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> > a. The 463.54 acres plus 4.68 acres of mineral interests reserved to the Government are located within the incorporated limits of the City of Vicksburg and are ineligible for lease.
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> > b. The remaining acreage at WES does not lend itself to intrusion from outside sources; some of the experiments are classified, and others may be considered dangerous for outside interference. Further, it is considered that offset drilling could introduce an unknown factor into some of the sensitive research testing. The research testing that involves vibrating equipment and explosives could be affected by a drilling operation. [Emphasis supplied.]

On reconsideration, BLM offers the underscored language as further support for rejection of the subject offers.

Jones and Phillips respond that the statutory exclusion for acquired lands situated within incorporated cities does not apply in the instant case. This exclusion is found at 30 U.S.C. § 352 (1982):

> [A]ll deposits of * * * oil [and] gas * * * which are owned or may hereafter be acquired by the United States and which are within the lands acquired by the United States (exclusive of such deposits in such acquired lands as are (a) situated within incorporated cities, towns and villages * * *) may be leased by the Secretary. [5/ Emphasis supplied.]

The limited legislative history focusing on this section suggests, in their view, that Congress sought to promote exploration and development of mineral reserves on Federal lands, and, therefore, the exclusionary language should be narrowly construed. They, accordingly, urge that the statutory phrase "situated within" be construed to mean "located entirely inside."

In addition to this construction of the phrase "situated within" (so-called by Jones and Phillips the integral tract principle), they advance two other constructions:

> (2) For the statutory exclusion to apply, the acquired lands must be under the control of the incorporated city. This option recognizes both a de facto and a de jure enclave principle; or
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> (3) That part of the tract that is without the city limits may be leased, and that which is within may not be leased. This option follows the bifurcation principle.

5/ See also 43 CFR 3100.0-3(b)(2)(ii).

Special Memorandum of Law on Exclusions under 30 U.S.C. § 352 (1982), dated November 20, 1984, at 12.

[1] On at least two occasions, 6/ this Board has applied the so-called bifurcation principle, which permits leasing of so much of an acquired tract as is not within the corporate limits of a city. In D. M. Yates, 76 IBLA 208 (1983), the Board held that the Mineral Leasing Act precluded BLM from leasing lands that had been annexed by the city of Richland, Washington. Other public lands in appellant Yates' offer not within the corporate limits of any city, town, or village, we held, were not unavailable for leasing because of the statutory exclusion. Again, in Sallie B. Sanford, 23 IBLA 312 (1976), BLM found that 15 of 16 parcels in Sanford's acquired lands lease offer were within the limits of the city of Benbrook, Texas, and that the offer was properly rejected pursuant to 30 U.S.C. § 352 (1982) as to those 15 parcels. As to the remaining parcel, BLM required Sanford to sign stipulations as a condition precedent to issuance of a lease for that parcel. This Board affirmed.

On the other hand, this Department has on two separate occasions rejected the enclave principle. 7/ In Bernard Silver, A-30873 (Nov. 28, 1967), we noted that the Mineral Leasing Act for Acquired Lands does not reference jurisdiction as a relevant criterion for determining whether land is to be excluded from leasing or included. Therein, Silver sought to show that the lands described in his offer, while within the exterior boundaries of three incorporated cities, were Federal enclaves under the exclusive jurisdiction of the United States and were, therefore, leasable under 30 U.S.C. § 352 (1982). Similarly, L. A. Walstrom, Jr., 46 IBLA 389 (1980), involved a challenge to a local ordinance by which the city of El Reno, Oklahoma, extended its corporate limits to include public lands sought by appellant. Walstrom argued that the ordinance was invalid insofar as it affected oil and gas leasing on Federal lands, contending that states cannot impinge upon the title of the United States to its lands nor interfere with its ability to dispose of them. This Board summarily rejected these arguments and focused instead on the statutory exclusion of incorporated cities from the Mineral Leasing Act. Jones and Phillips have provided no valid theoretical basis which would justify us in abandoning our consistent interpretation as to the scope of the leasing exception found in both 30 U.S.C. § 181 and § 352 (1982). 8/

6/ See also Nova L. Dodgen, 54 IBLA 340 (1981), and Tom H. Dowlen, A-27724 (Nov. 17, 1958).
7/ The term de facto enclave is used by Jones and Phillips to describe those lands in Tom H. Dowlen, supra, within the outer city limits of Los Angeles, yet excluded from the city by inner city boundaries drawn around the lands. A de jure enclave is created, according to them, when land over which the United States exercises exclusive legislation or jurisdiction is thereafter included within the limits of an incorporated city, town, or village.
8/ Indeed, acceptance of the de jure enclave principle would serve to virtually eradicate the exception insofar as public domain leasing under section 181 is concerned since, with the exception of land acquired prior to Feb. 20, 1920, all land subject to leasing would have been in Federal ownership prior to the establishment of any city, town, or village.

With respect to the remaining theory of construction, i.e., the integral tract principle, we note that Jones and Phillips have provided no citation to authority, whether administrative or judicial, in support of this construction. Moreover, this Department's application of the bifurcation principle is an implicit rejection of this final theory. Under the bifurcation principle, therefore, the 468.22 acres of land described by Jones and included within the corporate limits of Vicksburg are precluded by 30 U.S.C. § 352 (1982) from leasing by the Secretary.

[2] COE's objection to leasing the remaining acreage at WES precludes BLM from leasing any of this remaining acreage. As we noted in Sam P. Jones, supra, the Secretary of the Interior is without authority to lease acquired lands without the consent of the surface managing agency, regardless of that agency's reasons for withholding that consent. 9/ Thus, it is of no import that COE, on reconsideration, has changed the reasons for its failure to consent; nor is it material that Jones and Phillips have agreed to accept nonentry and nondrilling stipulations. Moreover, this rule applies even in cases where the jurisdictional agency conditions its consent to lease on the lessee's compliance with a requirement unrelated to the purposes for which the lands were acquired or are being administered. Amoco Production Co., 69 IBLA 279 (1982).

The record reveals that all lands within the WES are precluded by 30 U.S.C. § 352 (1982) from leasing. In its October 1, 1982, decisions, BLM rejected ES-28059 and ES-28060 in their entirety because of the lack of consent of COE. We affirmed those decisions in 74 IBLA 242. The record is now clear that substantial acreage included in those offers lies outside the WES. Of the 1,351.55 acres sought, only 679.67 acres comprise the WES according to the COE correspondence dated January 26, 1984, and quoted supra. Although, COE represents therein that the "remaining acreage in the applications are private lands," BLM should now determine whether any of those lands described in the offers which lie outside Vicksburg and WES boundaries are available for leasing. 43 CFR 3111.1-1(c). 10/

The BLM October 1, 1982, decisions and our decision in 74 IBLA 242 are affirmed in part, as modified, to reflect the additional rationale for partial rejection. However, our decision is vacated in part and the BLM decisions are vacated in part to the extent that they ruled on acreage outside the WES, and the cases are remanded in order to allow BLM to make a determination on the acreage in the offers lying outside city and WES boundaries. 11/

9/ See also 43 CFR 3101.7.

10/ Clearly, to the extent the offers include private lands, they must be rejected.

11/ Ordinarily, in such a case we would return the case files to BLM for further action on remand; however, in this case the Board has been directed to return the record to the court. See Supplement to the Order Remanding to the Interior Board of Land Appeals, dated Sept. 26, 1984, at 3.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions of the Eastern States Office are affirmed in part, as modified, and vacated in part and the cases remanded. Our decision in Sam P. Jones, 74 IBLA 242 (1983), is affirmed in part, as modified, and vacated in part.

Bruce R. Harris
Administrative Judge

We concur:

Wm. Philip Horton
Chief Administrative Judge

James L. Burski
Administrative Judge.